Supreme Court, U.S.
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CASE #_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

(CHARLES WILLIAM O'BRIEN),

F & S PROPERTIES,
WKH CORPORATION,
HWK CORPORATION
HKW PROPERTIES
JASPER INVESTMENT CORPORATION,
Petitioners,

v.

BANK ONE, COLUMBUS, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Petitioners
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September, 1992

QUESTIONS PRESENTED FOR REVIEW

Whether the Ohio Civil Rule 3(A) commencement requirement that **service be obtained within one year of filing in order to properly commence an action** is extended by the filing of an Amended Complaint and, thus, accords due process.

THE PARTIES

The parties are F & S Properties, WKH Corporation, HWK Corporation, HKW Properties, Jasper Investment Corporation and Bank One, Columbus, N.A.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

THE PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....2

A. Summary of Pertinent Facts.....2

REASONS FOR GRANTING THE WRIT.....10

CONCLUSION.....25

CERTIFICATE OF SERVICE.....28

APPENDICES

Entry of Supreme Court of Ohio.....A-1

Opinion of Court of Appeals.....A-2

TABLE OF AUTHORITIES

CASES

Baldine v. Klee (1968), 14 Ohio App. 2d181.....12

Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d, 549.....14,15,16,17,18,19,22 23,24,25

Lash v. Miller (1977), 50 Ohio St. 63.....12,21,22

Lincoln Tavern, Inc. v. Snader (1956), 165 Ohio St. 61.....12

Maryhew v. Yova, 11 Ohio St. 3d 154.....13,14

Mitchell v. Mitchell (1980), 64 Ohio St. 2d,49.....13

O.B. Corporation d/b/a Lincoln Village Lanes v. Cordell, Case No. 87AP-1184, unreported Franklin County Court of Appeals (1988).....12

Pistner v. Baxter, 2 Ohio App. 3d 69, 440 N.E. 2d, 812.....12

Regional Airport Authority v. Swinehart (1980), 62 Ohio St. 2d, 403.....13

Samson Sales v. Honeywell, Inc. (1981), 66 Ohio St. 2d 290.....12

Saunders v. Choi (1984), 12 Ohio St. 3d, 247.....23,24

State ex rel. Ballard v. O'Donnell (1990), 50 Ohio St. 3d 182.....11,12

State ex rel. Balson v. Harnishfeger (1978), 55 Ohio St. 2d 38.....11

Twardowski v. Cooper, Unreported, No. 8105 (Ohio Ct. App. Second Dist., filed May 2, 1983).....20

UNITED STATES STATUTES

28 U.S.C., Section 1257(3) and 2102(c).....2

Federal Civil Rule 4(j).....19

UNITED STATES CONSTITUTION

Fifth and Fourteenth Amendments to the United States Constitution.....2,26

OHIO STATUTES AND RULES

Ohio Civil Rule 3(A)....i,10,11,12,13,15,17,18 20,21,22,23,25,26

Ohio Civil Rule 4, et seq.....10,14

Ohio Revised Code Section 1701.07(H)..11,14,24

Ohio Rules Civ. Prac.....12

Ohio Civil Rule 4.4.....12

Ohio Civil Rule 4.4(A).....12

Ohio Civil Rule 4(B), et seq.....12

Ohio Civil Rule 41(A)(2).....16

Ohio's Saving Statute, Revised Code Section 2305.19.....16

Ohio Civil Rule 4(E).....17,19,20,21,22,23

OTHER CITATIONS

M.C. Sup. R. 6.....20

OPINIONS BELOW

The prior opinion most pertinent to this Petition and the judgment under review is the December 31, 1991 decision of the 10th District Court of Appeals of Ohio, Bank One, Columbus, N.A. v. Charles William O'Brien, et al., 91AP-166; 91AP-141 (unreported). A petition for discretionary review was denied by the Supreme Court of Ohio on May 27, 1992. The decision under review and the order denying review are reproduced in the Appendix of this Petition.

JURISDICTION

The Entry of the Ohio State Supreme Court was journalized on May 27, 1992. This Petition was filed within 90 days of May 27, 1992, including the extension. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(3) and 2102(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

On November 18, 1990, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $268,000.00.

On August 18, 1981, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $920,000.00.

On February 5, 1982, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $421,000.00.

On the foregoing dates, Karen Sue O'Brien was the title holder of certain improved parcels of real estate. Prior to the execution and delivery of the Note dated November 18, 1980, Bank One requested of Charles William O'Brien that copies of all title descriptions regarding the aforementioned real estate be provided to Bank One to enable the bank to determine what, if any, collateral could be secured. Bank One then proceeded, unilaterally, to attach all of Karen Sue O'Brien's real estate as collateral for the loans by attaching the property descriptions to the Mortgage Deeds, after such documents were signed, and without consent, permission or knowledge of Karen Sue O'Brien or Charles William O'Brien.

In June, 1982, Bank One received $100,000.00 from the sale proceeds of the personal residence of Karen Sue O'Brien and Charles William O'Brien. Prior to the closing, Bank One

executed and delivered two sets of partial releases. One set of releases pertained to the aforementioned property which was sold. The second set released the family residence as well as all those properties wrongfully encumbered by Bank One in 1980, 1981 and 1982.

In late 1986, with the passage of tax laws changing the real estate industry, Karen Sue O'Brien gave all her properties to various personal and corporate entities belonging to her children, Holly, Kelly and William O'Brien (O'Brien Entities). Thereafter, from January, 1987 to January, 1989, the loans with Bank One remained current and principal was substantially reduced.

During the years following the gift of the properties to the O'Brien children, the second set of releases was filed and the various properties were re-financed with other lenders.

During the years following the gift of the properties, Bank One accepted numerous checks representing payments in full of interest and principal on the Promissory Notes, all other

interest and principal being current as of January of 1989.

However, Bank One continually failed and refused to apply sizeable payments to principal on the loans targeted by Charles William O'Brien. Instead, Bank One, at its own discretion, used the monies to pay off lower interest bearing loans which were unsecured. Regrettably, although the loans were current as of January, 1989, Bank One refused to alter its course of self-dealing and misapplication of payments. Charles William O'Brien notified Bank One in writing that unless and until Bank One reconciled the payments and their misapplications, no further monies would be forthcoming.

In disregard of the rights of Karen Sue O'Brien, Charles William O'Brien and the O'Brien Entities, Bank One filed a Complaint seeking judgments on three "Cognovit" Notes signed by Karen Sue O'Brien and Charles William O'Brien and obtained judgment on March 17, 1989.

On April 5, 1989, Charles William O'Brien, acting on behalf of himself, filed a Civil Rule 60(B) Motion for Relief

from the March 17, 1989 Judgments.

On May 18, 1989, Bank One moved for leave to file an Amended Complaint.

On June 7, 1989, the Trial Court granted the Motion for relief, indicating that if the allegations contained in the Motion were true, Bank One could be barred from any judgment. Bank One was also given leave to amend.

On August 3, 1989, Bank One instructed the Clerk of the Courts to serve Karen Sue O'Brien by certified mail. On the same day, Bank One requested that the Clerk of Courts serve the O'Brien Entities by ordinary mail.

On February 27, 1990, Bank One instructed the Clerk to personally serve its Amended Complaint upon Karen Sue O'Brien and the O'Brien Entities.

On April 9, 1990, Bank One instructed the Clerk of the Common Pleas Court to issue summons and a copy of the Amended Complaint for service by ordinary mail upon WKH Corporation, HWK Corporation and Jasper Investment

Corporation all C/O Tammy M: Cordell, Statutory Agent.

On April 25, 1990, Bank One instructed the Clerk of the Common Pleas Court to serve by publication Karen Sue O'Brien, F & S Properties and HKW Properties. On April 27, 1990, Bank One instructed the Clerk of the Common Pleas Court to serve WKH Corporation, HWK Corporation and Jasper Investment Corporation by personal service. On May 8, 1990, the notice of receipt of personal service of summons on HWK Corporation, WKH Corporation and Jasper Investment Corporation all C/O Kelly P. O'Brien was filed.

On June 22, 1990, Bank One moved for leave to file its Second Amended Complaint.

At a July 27, 1990, hearing the Trial Court took Bank One's Motion to file its Second Amended Complaint under advisement; ordered that Charles William O'Brien respond to Bank One's interrogatories and produce documents responsive to Bank One's request for production of documents in ten days from the date of the hearing; indicated that Charles William

O'Brien, WKH Corporation, HWK Corporation and Jasper Investment Corporation had not responded to Bank One's Amended Complaint and were in default; granted Charles William O'Brien and the aforementioned corporations seven days within which to answer Bank One's Amended Complaint; and reaffirmed the trial date of January 28, 1991.

On August 8, 1990, the O'Brien Entities moved to dismiss the action against them.

On September 5, 1990, the Trial Court granted Bank One's Motion for leave to filed its Second Amended Complaint.

On September 5, 1990, the Trial Court journalized its orders from the July 27, 1990 hearing, ordering that: WKH Corporation, HWK Corporation and Jasper Investment Corporation respond to the Amended Complaint by August 8, 1990; and the trial date of January 28, 1991 was reaffirmed.

On September 6, 1990, Bank One filed its Second Amended Complaint and instructed the Clerk of the Common Pleas Court to serve the Second Amended Complaint by

publication upon Karen Sue O'Brien, F & S Properties and HKW Properties.

On January 28, 1991, Bank One filed its Motion for Default Judgment and Dismissal against Karen Sue O'Brien, Charles William O'Brien and the O'Brien Entities.

On January 29, 1991, the Trial Court, by Journal Entry, denied the O'Brien Entities' Motion to Dismiss and ordered them to answer Bank One's Second Amended Complaint within 14 days.

On February 12, 1991, the Trial Court signed the Entry of Judgment as against Karen Sue O'Brien and Charles William O'Brien and the O'Brien Entities.

On February 12, 1991, the Trial Court signed a Judgment Entry of Foreclosure as against Karen Sue O'Brien and Charles William O'Brien and the O'Brien Entities.

On February 12, 1991, the O'Brien Entities filed a Notice of Appeal.

On March 11, 1991, the Trial Court entered an ex parte Amended Judgment Entry and Decree in Foreclosure.

The Tenth Appellate District Court of Franklin County, Ohio, reached a decision on December 17, 1991 which indicated that the filing of an Amended Complaint, even though outside the Civil Rule 3(A) requirement that service must be obtained within one year of the filing of the original Complaint, extended the one year cut-off for such service.

The Supreme Court declined to review the issues regarding commencement in its Entry of May 27, 1992.

REASONS FOR GRANTING THE WRIT

The underlying case was filed by Bank One on March 17, 1989. After the passage of more than one year, Bank One had not obtained service upon any of the O'Brien personal or corporate Entities - solely due to Bank One's failure to follow the provisions contained in Ohio Civil Rule 4, et seq. to obtain such service - which includes but is not limited to service by publication or, in the case of the corporate entities, service

upon the Secretary of State pursuant to Ohio Revised Code Section 1701.07(H). Bank One was imprudent and dilatory in its attempts at service as either of the above-mentioned attempts at service would have guaranteed service with the one year requirement of Civil Rule 3(A).

Bank One's Amended Complaints of June 7, 1990 and September 6, 1990 were not new or re-filed Complaints and they both related back to the initial filing of March 17, 1989. The Entities relied upon established Ohio case law and refused to enter the fray, particularly as such Entities were not in privity with Bank One and owed Bank One no monies.

Ohio law deems completion of service of Civil Process as the prerequisite to the commencement of an action. Completion of service determines the Court's authority: State ex rel. Balson v. Harnishfeger (1978), 55 Ohio St. 2d 38.

For a Court to acquire jurisdiction, there must be proper service of summons and a judgment rendered without proper service is a nullity and void: State ex rel. Ballard v. O'Donnell

(1990), 50 Ohio St. 3d 182 following Lincoln Tavern, Inc. v. Snader (1956), 165 Ohio St. 61 at page 64.

It is the completion of original process which is essential to clothe Trial Court with jurisdiction to proceed: Baldine v. Klee (1968), 14 Ohio App. 2d 181; Lash v. Miller (1977), 50 Ohio St. 63 followed at O.B. Corporation d/b/a Lincoln Village Lanes v. Cordell, Case No. 87AP-1184, unreported Franklin County, Court of Appeals (1988).

Service of notice by publication is obtained only upon last publication of notice of service for purposes of rule providing that civil action is commenced with Court if service is obtained within one year from such filing, Ohio Rules Civ. Prac., Rules 3(A), 4.4, 4.4(A); Pistner v. Baxter, 2 Ohio App. 3d 69, 440 N.E. 2d, 812.

In Ohio, it is contemplated that original service of process be effected only through and by the Clerk of Courts, Civil Rule 4(B), et seq.; Samson Sales v. Honeywell, Inc. (1981), 66 Ohio St. 2d 290. Fundamental due process

requires "notice" to the Defendant sufficient to apprise him of the action's pendency so he may represent his objections thereto: Regional Airport Authority v. Swinehart (1980), 62 Ohio St. 2d, 403 and Mitchell v. Mitchell (1980), 64 Ohio St. 2d, 49.

A Defendant, who had not been served with process within one year from the filing of the action against her, had no obligation to move or otherwise plead within the year and her failure to do so would not have waived her right to affirmative defense of lack of personal jurisdiction: Maryhew v. Yova, 11 Ohio St. 3d 154.

Inaction upon part of the Defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with necessity of service. The Civil Rules do not change this common law of Ohio: Maryhew v. Yova, supra.

The philosophy of Civil Rule 3(A) is that the Court dockets should be cleared if service has not been attained

within the reasonable time of one year, Maryhew v. Yova, supra.

Within the first year of Bank One's initial filing on March 17, 1989, Bank One did not reasonably undertake to avail itself of any adequate or prudent measures to obtain service under the Ohio Civil Rules, Rule (4), et seq. or under the statutory provisions pursuant to Ohio Revised Code Section 1701.07(H) which provide that service upon a corporation may be effectuated by certified mail service upon the Secretary of State.

Until the Tenth District Court of Appeals decision rendered December 17, 1991, the Entities were on solid ground. The Supreme Court of Ohio had decided a string of related cases supporting the Entities' position - particularly in light of the dilatory conduct by Bank One.

During the course of the first appeal, the Supreme Court of Ohio handed down a decision in Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d, 549. It is upon the

Goolsby case that Bank One and the Tenth District Court of Appeals upheld service upon the O'Brien Entities via extension of the requirements of Ohio Civil Rule 3(A).

It will be important, therefore, to analyze Goolsby and discuss why that decision sets an inappropriate standard for service in Ohio as adopted by the Appellate decisions in this case and consequential denial of due process.

Bank One, depending upon Goolsby, argued and the Appellate Court adopted the idea that successive amendments to an initial Complaint can cure the failure of service defects under Ohio Civil Rule 3(A) by extending the time for commencement of an action. Bank One used successive amendments to its original Complaint to circumvent the requirements of Ohio Civil Rule 3(A) and the existing Ohio case law upon which the O'Brien Entities relied.

In the Goolsby case, Plaintiff Goolsby filed her Complaint on February 6, 1986 and asked the Clerk to refrain from service; gave instructions for service on July 17, 1987,

obtained service on July 23, 1987, then turned around and dismissed the action pursuant to Ohio Civil Rule 41(A)(2) with approval of the Trial Court. On July 27, 1989, Plaintiff Goolsby refiled her Complaint pursuant to Ohio's Saving Statute, Revised Code Section 2305.19 and a subsequent Motion by the Defendant to dismiss pursuant to Civil Rule 3(A), i.e., lack of timely commencement, was granted.

The holding in Goolsby did not reverse or modify any of the aforementioned cited cases which require service within one year to achieve commencement. Goolsby did not apply or address the issue of an Amended Complaint. The Goolsby Trial Court allowed Plaintiff Goolsby to continue the action despite her dilatory instruction to the Clerk not to issue a summons. Then, the Goolsby Trial Court approved Plaintiff Goolsby's dismissal without prejudice under Ohio Civil Rule 41(A)(2) on November 11, 1988. When Plaintiff Goolsby attempted to refile an identical Complaint on July 27, 1992, the Defendant moved to dismiss the second suit because the second Complaint

had not been served within one year of the original filing on February 6, 1986. The sole reason for the reversal in Goolsby was the abuse of discretion of the Trial Court in preventing a trial upon the merits by avoidance of the Savings Statute. This fact is clearly demonstrated by the language of the Goolsby case.

The Supreme Court of Ohio stated that the Goolsby Trial Court failed to apply the Ohio Civil Rules, particularly Civil Rule 4(E); that the Goolsby Trial Court should have, upon its own initiative, dismissed Plaintiff Goolsby's Complaint without prejudice as service was neither instructed nor obtained within six months of the initial filing; that Ohio Civil Rule 3(A) is designed to clear the dockets of cases in which a Plaintiff has not pursued service upon a Defendant; that in most instances, the rule would be applied when a Plaintiff has neglected to again attempt service after original service of process fails; that it was beyond question that the rule should have been applied in the Goolsby action where the Clerk was

instructed to refrain from attempting service.

However, the Goolsby Trial Court did not act pursuant to Ohio Rule by its inaction or by its action. By its inaction, the Goolsby Trial Court allowed Plaintiff Goolsby to file her Complaint, wait over one year and 5 months to instruct the Clerk to make service and obtain service within the statute of limitations period on July 23, 1987. Then, the Goolsby Trial Court sought to deny Plaintiff Goolsby her right to trial on the merits by misapplying Ohio Civil Rule 3(A). The Supreme Court of Ohio stated that "Under these circumstances, an application of Civil Rule 3(A) barring Plaintiff Goolsby from obtaining a resolution on the merits would not comport with the spirit of the Civil Rules", further finding that Goolsby's second Complaint was valid under the Savings Statute based upon the fact that her first action had been commenced within the limitation period and subsequently dismissed without prejudice.

The Supreme Court of Ohio was adamant about the Trial Court's inaction over Plaintiff Goolsby's dilatory conduct regarding the instruction not to make or timely pursue service, stating emphatically that the proper action by the Goolsby Trial Court would have been to dismiss Plaintiff Goolsby's initial Complaint pursuant to Ohio Civil Rule 4(E) without prejudice, thereby causing Plaintiff Goolsby to refile her case.

Ohio Civil Rule 4(E) states:

"Effective July 1, 1984, Rule 4(E) was added to Rule 4 by amendment. The new subdivision, patterned after recently adopted Federal Civil Rule 4(j), provides that if the summons and complaint are not served upon a defendant within six months and the plaintiff, attempting in-state service of process, cannot show good cause why service was not effectuated, the court shall dismiss the action without prejudice."

"It should be noted that Rule 6, of the Common Pleas Court and Municipal Court Superintendence Rules, has provided at least since 1979 that an action may be dismissed

within six months after filing if no "proceedings" have been "taken therein." However, in Twardowski v. Cooper, Unreported, No. 8105 (Ohio Ct. App. Second Dist., filed May 2, 1983) the court held that M.C. Sup. R. 6 could not be relied upon in order to dismiss an action when service of process had not been effectuated in six months. The court stated that the one-year provision of Rule 3(A) to perfect service of process in civil actions prevails over M.C. Sup. R. 6 Rule 4(E) was undoubtedly intended to supersede the holding in the Twardowski case and at the same time avoid conflict with Rule 3(A). The reasons are several."

"First, M.C. Sup. R. 6 is not specifically directed to service of process nor does it state whether a dismissal pursuant to the rule is or is not without prejudice. In light of the wording of M.C. Sup. R. 6, the Twardowski case was correct in holding that the six-month M.C. Sup. R. 6 provision conflicted with the one-year provision of Rule 3(A). In contrast, Rule 4(E) is specifically directed to service of process

and specifically states that a dismissal under the rule is without prejudice. Moreover, the rule provides for notice and an opportunity to show cause before the action may be dismissed."

"Second, Rule 4(E) is merely an administrative regulation applicable only to civil cases involving in-state service of process. The rule is directed toward clearing the docket of those non-diligent plaintiffs who neglect follow-up, in-state process then original in-state service of process fails. The rule does not apply to the more time-consuming procedures involved in out-of-state or foreign service of process. The fact that Rule 4(E) is of limited application indicates its administrative, docket-clearing purpose."

"Third, because a Rule 4(E) dismissal is a dismissal without prejudice, thus affording a party the opportunity to file over again, such a dismissal does not conflict with Rule 3(A). Rule 3(A) bars an action only if service of process has not been effected within one year after the filing of the complaint. Lash

v. Miller (1977), 50 O.S. 2d, 63 "

"Whether the docket-clearing function of Rule 4(E) is necessary may be questioned. As noted the rule applies only to in-states cases. In a busy municipal court, clearing the docket of many neglected, poorly prosecuted small cases may be beneficial from the standpoint of efficient judicial administration. On the other hand, if a case is dismissed without prejudice pursuant to Rule 4(E) six months after the complaint is filed and the statute of limitations in the cause has run, the dismissed plaintiff will have at least one year to file over again under the savings statute, RC Section 2305.19. In short, in light of a Rule 4(E) dismissal the plaintiff will have longer to perfect service of process than would be possible under the one-year limitation of Rule 3(A)."

The Supreme Court of Ohio stated that it was "unfortunate that this case (Goolsby) demands resolution of a situation that would have been avoided had the Civil Rules been applied by the trial court below." In other words, the

Goolsby case was decided upon the improper use of Civil Rule 3(A) to void the Savings Statute and dismiss the second Complaint. Goolsby had nothing whatsoever to say about whether a 3(A) dismissal would have been proper after one year had expired without service after the filing of the initial Complaint. Goolsby did say, however, that the initial Complaint should have been dismissed, sua sponte under Ohio Civil Rule 4(E), as service was not made upon the Defendant within six months after the filing of the Complaint.

Consequently, the purpose of Ohio Civil Rule 3(A) at Saunders v. Choi (1984), 12 Ohio St. 3d, 247 is:

Among other things, the purpose of Civ.R. 3(A) is designed to promote the prompt and orderly resolution of litigation, as well as eliminating the unnecessary clogging of court dockets caused by undue delay. The rule puts litigants on notice that a reasonable time will be afforded in order to obtain service of process over defendants. Such a rule goes to the essence of civil procedure and is not, in our view, a mere

technicality designed to deny parties their day in court.

As in the instant case, a plaintiff is the master of his or her cause of action. The failure of a plaintiff to comply with rules promulgated under our uniform modes of procedure should not compel this court to carve out a limited exception in order to grant such a litigant another opportunity to do that which he failed to do in the first place. Saunders, supra, page 250 with emphasis.

Saunders is still the prevailing view. The decision was not disturbed nor distinguished in the Goolsby Supreme Court decision. Since Bank One used Goolsby solely as an example of the Supreme Court of Ohio's reliance upon Saunders, the August 28, 1991 holding in Goolsby should not be viewed as unfavorable. Further, Goolsby does not consider such issues as successive amendments to initial complaints and the consistent amenability of corporate bodies to service of process under Section 1701.07(H) of the Ohio Revised Code.

Having distinguished Goolsby, it is obvious that Ohio law regarding commencement and service has not been changed thereby. Goolsby addresses the very narrow issue of the preservation of an action under the Limitations and Savings Statutes, Ohio Revised Code Sections 2305.10 and 2305.19. In Goolsby, the Supreme Court of Ohio sought only to reverse the Goolsby Trial Court's inconsistent decisions regarding the aforementioned statutes based upon an improper application of Ohio Civil Rule 3(A).

CONCLUSION

Bank One failed to timely acquire service upon the O'Brien Entities. Pursuant to Ohio Civil Rule and case law, there was no actual notice of the suit to the entities and the trial court lacked authority to render any judgment against the O'Brien Entities. The trial court's judgment and the Tenth District Appellate Court's Decision, relying upon Goolsby, squarely conflicts with the requirement of notice and due process as required by Ohio Civil Rule 4 et seq., the

requirement of commencement as required by Ohio Civil Rule 3(A) and the application of the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution to these facts. The conflict between existing and valid Ohio case law and the Trial and Appellate Court Decisions, which were improperly ratified by the refusal of the Supreme Court of Ohio to exercise its discretionary power, is reasonable justification for these Petitioners to ask this Honorable Court to exercise its discretionary review powers and reverse the underlying Decisions.

No procedural or substantive due process has been accorded Petitioners and this case should be remanded to the Trial Court with instructions to dismiss for want of in personam jurisdiction, thereby eliminating future irreparable damage to other litigants who may rely upon the same Rules

and case law as did the O'Brien Entities.

Respectfully submitted,

Gina M. Dougherty (DOU 13)
Supreme Court No. 0022195
336 South High Street
Columbus, Ohio 43215
(614) 461-6300

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Writ of Certiorari was served upon counsel for Plaintiff-Appellee, Bank One, Columbus, NA, Michael W. Donaldson, VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008; Counsel for Freedom Federal Savings and Loan, Nelson E. Genshaft, SCHWARTZ, KELM, WARREN & RUBENSTEIN, 41 South High Street, Columbus, Ohio 43215; and, Counsel for Merit Savings and Lyndon Guaranty Bank of Ohio, Thomas R. McGrath, MCGRATH, KAUFMAN, HATCHER, 175 South Third Street, Suite 1070, Columbus, Ohio 43215, by regular U.S. Mail, postage prepaid, this 3rd day of September, 1992.

Gina M. Dougherty (DOU 13)
Supreme Court No. 0022195

THE SUPREME COURT OF OHIO

1992 TERM

To wit: May 27, 1992

Bank One, Columbus, N.A., Appellee,	:	Case No. 92-440
v.	:	
Charles William O'Brien et al., Appellants.	:	E N T R Y

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Franklin County to certify its record. Upon consideration of appellee's motion to dismiss,

IT IS ORDERED by the Court that said motion to dismiss be, and the same is hereby, sustained.

IT IS FURTHER ORDERED by the Court that this cause be, and the same is hereby, dismissed.

COSTS:

Motion Fee, $40.00, paid by Keila Weakley.

(Court of Appeals Nos. 91AP166 & 91AP441)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank One, Columbus, N.A.,	:	
Plaintiff-Appellee,	:	Nos. 91AP-166 and 91AP-441
v.	:	(REGULAR CALENDAR)
Charles William O'Brien and Karen Sue O'Brien et al.,	:	
Defendants-Appellees.	:	
(F&S Properties, WKH Corporation, HWK Corporation, HKW Properties, and Jasper Investment Corporation,	:	
Defendants-Appellants).	:	

OPINION

Rendered on December 31, 1991

VORYS, SATER, SEYMOUR AND PEASE, and MR. MICHAEL W. DONALDSON, for appellee Bank One, Columbus, NA.

MS. LUIGIA TENUTA, for appellants.

MR. CHARLES WILLIAM O'BRIEN, pro se.

SCHWARTZ, KELM, WARREN & RUBENSTEIN, MR. NELSON E. GENSHAFT and MR. D. DAVID CARROLL, for appellee Freedom Savings Association, F.A.

McGRATH, KAUFMAN, HATCHER CO., L.P.A., MR. THOMAS R. McGRATH and MR. ERIC J. WITTENBERG, for appellees Lyndon Guaranty Bank of Ohio and Merit Savings Association.

APPEALS from the Franklin County Court of Common Pleas.

PETREE, J.

Appellants, F&S Properties, WKH Corporation, HWK Corporation, HKW Properties and Jasper Investment Corporation, appeal from a judgment of foreclosure rendered by the Franklin County Court of Common Pleas in favor of appellee Bank One. The judgment on appeal was taken against

appellants by default pursuant to Civ. R. 37(B)(2)(c) as a sanction for their failure to attend depositions noticed by Bank One. In conjunction with the default judgment, the trial court also appointed a receiver to take possession and control of certain real property owned by appellants. From these judgments, appellants appeal, asserting the following assignments of error:

> "I. When an action is not properly commenced, under Ohio Civil Rule 3(A), upon a named defendant, the court lacks in personam jurisdiction. Any judgment rendered against such defendant is void ab initio.
>
> "II. Appellant-companies were denied due process of law when the trial court rendered a default judgment in foreclosure.
>
> "III. When an action has not been properly commenced against a party in interest by filing a complaint and obtaining service under the rules, the appointment of a receiver by the trial court is unauthorized and void.
>
> "IV. During the pendency of the appeal from a judgment entry and decree in foreclosure, an amended entry in foreclosure, issued by the trial court, is void for want of jurisdiction."

This action was brought by Bank One to obtain judgment and foreclosure on three notes and mortgage deeds executed by Charles William O'Brien and Karen Sue O'Brien. Appellants were first named as defendants in this suit in Bank One's first amended complaint filed on June 9, 1989. In this complaint, Bank One alleged that Charles William O'Brien has fraudulently executed and recorded releases of three mortgages held by Bank One. The complaint further alleged that, having fraudulently released Bank One's liens upon his property, O'Brien conveyed the property to appellants, five incorporated and unincorporated entities allegedly in his control. Personal service of the complaint was made upon three of the appellant-companies, WKH Corporation, HWK Corporation, and Jasper Investment Corporation, on May 7, 1990. Bank One was, however, unable to effect service on the remaining two companies. On June 22, 1990, Bank One moved for leave to file a second amended complaint. The amended complaint was identical to its predecessor in all material respects and its

explicit purpose was to obtain an additional year within which to commence an action against the remaining defendants under Civ. R. 3(A). Leave was granted by the trial court and Bank One filed the amended complaint on September 6, 1990. Service of the second amended complaint was then made upon F&S Properties and HKW Properties by publication.

In response to Bank One's complaint, appellants filed a motion to dismiss in which they asserted that the action had not been properly commenced against them under Civ. R. 3(A). This motion was not ruled upon by the trial court until January 18, 1991. In a judgment entry mailed on that date, the court denied the motion to dismiss and ordered that appellants file an answer within fourteen days. Adding three days for ordinary mail service under Civ. R. 6(E), appellants' answer was due on February 7, 1991. The trial in this matter was scheduled to go forward five days later on February 12, 1991.

On Friday, January 18, 1992, Bank One served notice that it would take the depositions of those persons designed by appellants to testify on their behalf on the following Wednesday and Thursday. No representative for the appellant-companies appeared at the scheduled depositions, but appellants' counsel did send Bank One a letter in which she expressed her understanding that the depositions had been canceled. Citing appellants' failure to attend the scheduled depositions, Bank One filed a motion for default judgment pursuant to Civ. R. 37(B)(2)(c) and (D). In that same motion, Bank One also sought a default judgment against O'Brien for reasons not relevant to this appeal. One day later the court issued notice that "should defendant O'Brien fail to comply [with the court's previous orders] on or before February 5, 1991 at 1:00 p.m. the court will consider the motion for default without further notice on Wednesday, February 7, 1991 at 11:00 a.m. ***. "When appellants' counsel failed to appear at the February 7 hearing, the court ruled that a default

judgment against appellants would be granted in favor of Bank One. A judgment to this effect was journalized on February 12, 1991. In this entry, the court also granted a default judgment against O'Brien, which judgment is the subject of a separate appeal in this court. Finally, in a separate judgment entry, the court appointed a receiver to take possession and control of fifteen parcels of real property owned by appellants and in which Bank One claimed an interest by virtue of this action.

I.

By their first assignment of error, appellants maintain that no judgment may be taken against them because the action was not properly commenced within one year as required by Civ. R. 3(A). That rule provides that "a civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing ***." The record indicates that three of the appellant-companies were served within one year after they were first named in Bank One's first

amended complaint. We reject appellants' argument that the provisions of Civ. R. 15(A) in conjunction with Civ. R. 3(A) require that new-party defendants joined by an amended complaint be served with one year of the original, rather than the amended complaint. While there may be some question as to the date Bank One's action was commenced against these three companies, there can be no question that the action was, in fact, commenced under Civ. R. 3(A).

A more difficult problem is presented regarding the other two appellant-companies. The record reveals that Bank One did not complete service by publication upon F&S Properties and HKW Properties until October 19, 1990, well over a year after they were first named in the first amended complaint. Bank One maintains that it obtained an additional year within which to make service on appellants by virtue of its second amended complaint, filed on September 6, 1990. As appellants point out, this court previously rejected the precise argument advanced by Bank One in Back v. Souder (July 12,

1990), Franklin App. No. 89AP-627, unreported (1990 Opinions 2942). Nevertheless, we conclude that Back is no longer controlling on this issue in light of the Supreme Court's recent holding in Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d 549.

In Goolsby, the plaintiff filed a complaint against a named defendant but instructed the clerk not to make service of the complaint. Seventeen months later, the clerk was instructed to and did make service within one year as required by Civ. R. 3(A), the court nevertheless held that the action had been properly commenced. In reaching this conclusion, the court adopted reasoning striking similar to that rejected by this court in Back, supra. Observing that the plaintiff could have obtained an additional year within which to make service by filing a voluntary notice of dismissal and then refiling the action, the Goolsby court held that an instruction by the plaintiff to attempt service is equivalent to refiling the cause of action for purposes of Civ. R. 3(A). Applying Goolsby to the

facts of this case, we hold that filing an amended complaint is also equivalent to refiling the complaint and that this action gave Bank One an additional year within which to make service under Civ. R. 3(A). Because F&S Properties and HKW Properties were served within one year after Bank One filed its second amended complaint, the action against them was properly commenced under Civ. R. 3(A).

The first assignment of error is not well-taken.

II.

In the second assignment of error, appellants maintain that the trial court erred and abused its discretion when it rendered a judgment of foreclosure by default against appellants pursuant to Civ. R. 37(B)(2)(c).

Civ. R. 37(B) authorized the court to impose a variety of sanctions where "*** a party fails to obey an order to provide or permit discovery ***." Possible sanctions include an award of reasonable expenses and attorney fees, an order prohibiting the introduction of designated matters into

evidence, and an order striking selected claims or defenses. In extreme cases, the court may dismiss the action or render judgment by default against the disobedient party. Although the selection of an appropriate remedy is a matter committed to the discretion of the trial court, the most drastic sanctions must be reserved for flagrant cases. American Housing Corp. v. Rhoades (1981), 1 Ohio App. 3d 130, 131. Because Ohio law favors the resolution of cases on their merits, the harsh remedies of dismissal and default should be imposed only where the failure to comply with the court's order is the product of willfulness or bad faith. Toney v. Berkemer (1983), 6 Ohio St. 3d 455, syllabus; Sedgwick v. Kawasaki Cycleworks, Inc. (1985), 24 Ohio App. 3d 109, 111. Where the circumstances do not warrant a finding of willfulness or bad faith, the trial court should consider the alternative sanctions set forth in Civ. R. 37(B)(2)(a), (b), and (d). On appeal, we review the trial court's choice of sanctions for an abuse of discretion. Ward v. Hester (1973), 36 Ohio St. 2d 38.

On our review of the record, we are convinced that the trial court abused its discretion when it granted a default judgment under these circumstances. As it is the most severe remedy available under Civ. R. 37(B)(2)(c), a judgment by default may be rendered only upon a finding that the party's non-compliance with the court's ordered or the rules of discovery is willful or in bad faith. In this case, there is simply no evidence which would warrant such a finding. Appellants did not simply fail to attend the depositions without explanation. On the contrary, appellants explained that they thought the depositions had been canceled in accordance with Bank One's prior correspondence. The correspondence referred to is a cover letter mailed by Bank One with the deposition notices. In that letter, Bank One stated if the trial date was to be continued past January 28 - a near certainty since appellants' motion to dismiss was not ruled upon until January 18 - Bank One would withdraw the enclosed notice to take appellants' depositions. One day prior to the transmission of

this correspondence, the assignment office had, in fact, issued notice continuing the trial date to February 12, 1991. As Bank One suggests, appellants should not have simply assumed that the depositions had been canceled, but such a lapse in judgment does not quite constitute willful or dilatory conduct warranting the imposition of a default judgment.

The fact that appellants' counsel failed to make a timely appearance at the February 7 hearing also does not warrant a judgment by default. It is well-established in this appellate district that the mere failure to attend a scheduled hearing is not grounds for a judgment of dismissal or default absent some other showing of dilatory or irresponsible conduct. Nicol v. Ever-Dry Waterproofing, Inc. (1987), 37 Ohio App. 3d 106; American Housing Corp., supra. Furthermore, in such cases we have required that the court give advance notice before dismissing a case based on a party's failure to attend a trial or hearing. Ford Motor Credit Co. v. Potts (1986), 28 Ohio App. 3d 93. Finally, the transcript of the February 7 hearing

indicates that counsel for appellants did, in fact, appear at the hearing though she was apparently ten minutes late. Whether or not a default judgment might be granted based upon appellants' total failure to appear at the hearing, it is clearly an abuse of discretion to grant a default judgment because counsel was a few minutes late.

We note that appellants are represented separately from their co-defendant, Charles William O'Brien. In considering this appeal, we have taken special care not to confuse appellants' conduct with the contemptuous and reprehensible behavior of their co-defendant. Although Bank One asserts that appellants are either owned or controlled by O'Brien, there is no proof supporting this allegation. Until it is shown that the appellant-companies are mere shams formed for the purpose of perpetrating a fraud or that they are wholly owned and controlled by O'Brien, the court may not impose sanctions against appellants for O'Brien's conduct. Cf., Sedwick, supra; Anderson v. Air West, Inc. (C.A.9, 1976), 542 F.2d 1090. On

the record before us, we find the entry of a default judgment to be an abuse of discretion.

The second assignment of error is well-taken.

III.

In the third assignment of error, appellants assert that the trial court erred in appointing a receiver to take charge of property owned by appellants. The appointment of a receiver is governed by R.C. 2735.01. That section provides that a receiver may be appointed in the following circumstances:

> "(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;
>
> "(B) In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been

performed, and the property is probably insufficient to discharge the mortgage debt[.]"

In granting Bank One's motion for the appointment of a receiver, the trial court apparently relied on sections (A) and (B), finding that the property or fund was in danger of being lost, removed, or materially injured and that the property was probably insufficient to discharge the mortgage debt. The trial court's decision to appoint a receiver will not be disturbed absent an abuse of discretion. State, ex rel. Celebrezze v. Gibbs (1991), 60 Ohio St. 3d 69, 73. Nevertheless, there must be some evidence of record tending to prove the facts essential to the order. Where a finding necessary to support the appointment of a receiver under the statute is not supported by any evidence in the record, an abuse of discretion occurs and the order must be reversed. Malloy v. Malloy Color Lab, Inc. (1989), 63 Ohio App. 3d 434, 436.

After reviewing the record in this case, we find a complete absence of evidence to support either of the court's

findings. The briefs and memoranda of the parties are not evidence. The only affidavit in the file merely states "[t]hat depending upon this court's determination of the priority of mortgages upon the subject property, the value of such property may be insufficient to discharge the mortgage debt of Bank One." The affidavit does not set forth any facts to support this statement, nor does the conclusion that the property "may be insufficient" meet the applicable standard that the "property probably is insufficient to discharge the mortgage debt." Furthermore, there is simply no evidence supporting the court's finding that the property was in danger of being lost, removed or materially injured. Because there is no evidence to support the appointment of a receiver under R.C. 2735.01(A) and (B), the court abused its discretion in granting Bank One's motion for the appointment of a receiver.

A receiver was also appointed upon the motion of three other parties with regard to whom no final judgment had been rendered when this appeal was taken. However, because the

appointment of a receiver is a final appealable order, we proceed to consider the motions filed by Merit Savings Association, Lyndon Guaranty Bank, and Freedom Savings Association. Each of these motions asserted that a receiver should be appointed without regard to the provisions of R.C. 2735.01, based upon the terms of the mortgage agreements executed by appellants. While we agree that a receivership can be awarded upon the terms of a contractual agreement, e.g., Federal Land Bank v. DeRan (1944), 74 Ohio App. 365, no agreement to this effect was ordered as evidence in this action. It is an abuse of discretion to appoint a receiver based upon a purported agreement which is not properly submitted in evidence, by affidavit or otherwise.

The third assignment of error is well-taken.

IV.

Finally, in the fourth assignment of error, appellants challenge the validity of an amended judgment entry filed by

the court on March 12, 1991, some thirty days after this appeal was filed. On Bank One's motion, the trial court corrected an omission in the original judgment entry by attaching to it an exhibit which specifically set forth the deeds to be set aside as directed by the judgment. The amendment effected no substantive change in the judgment entry.

Appellants contend that the amended judgment entry must be held null and void because the trial court was divested of jurisdiction to modify or correct the judgment during the pendency of this appeal. For this proposition, appellants rely on the judgment of the Cuyahoga County Court of Appeals in Vavrina v. Greczanik (1974), 40 Ohio App. 2d 129. That court held that a trial court lacks jurisdiction to act on a motion for relief from judgment filed pursuant to Civ. R. 60(B) during the pendency of an appeal. This court has, however, declined to follow the reasoning set out in Vavrina and its progeny. Eg., Stickney v. Ervin (Dec. 5, 1989), Franklin App. No. 89AP-616, unreported (1989 Opinions 4596); In Re Estate of Davis (Dec.

20, 1979), Franklin App. No. 79AP-731, unreported (1979 Opinions 4089). Instead, we have held that a trial court retains jurisdiction to consider a motion for relief from judgment filed under Civ. R. 60(B) during the pendency of an appeal because such a determination does not interfere with our jurisdiction to proceed with the appeal. See In Re Kurtzhalz (1943), 141 Ohio St. 432, Similarly, a trial court is not divested of jurisdiction to correct a judgment entry during the pendency of an appeal pursuant to Civ. R. 60(A). While that rule states that a trial court should obtain leave of the appellate court before correcting a judgment in which an appeal is pending, the failure to do so does not oust the trial court of jurisdiction; it merely constitutes an error reviewable on appeal. In this case, the error is non-prejudicial because the trial court's correction of the judgment entry in no way interfered with our jurisdiction and we would have granted leave had such a motion been filed.

The fourth assignment of error is not well-taken.

For the foregoing reasons, appellants' second and third assignments of error are sustained, and the first and fourth assignments of error are overruled. The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion and in accordance with law.

Judgment reversed and
cause remanded.

STRAUSBAUGH and BRYANT, JJ., concur.